Supreme Court, U.S.
FILED

(1)

No. 97 1046 DEC 23 1997

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Paul M. McDonald, Pro Se - PETITIONER

VS.

St. Louis Southwestern Railroad - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Paul M. McDonald

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26 pp

QUESTION(S) PRESENTED

1. Can the United States Court of Appeals - Eighth Circuit - and District Court enter a decision in conflict with the decision, of the United States Supreme Court on the same important matter? The Continuing Violation Theory can be applied in this case under the appropriate facts, proving that the Plaintiff's claim was filed in a timely matter complying with the provisions of Title VII of the 1964 Civil Rights Act.

2. Can the United States Court of Appeals - Eighth Circuit - and District Court enter a decision in conflict with the decision of another United States Court of Appeals on the same important matter? The Defendant's failure to respond to the Plaintiff's certified letter dated December 3, 1993, requesting reinstatement or accommodation, was a Separate and Distinct Act of Discrimination which occurred within the limitations period of the American Disability Act.

3. Will the United States Supreme Court agree that the Plaintiff did comply with Rule C-10 and that the U.S. Court of Appeals - Eighth Circuit - has so far departed from the accepted and usual course of judicial proceeding and sanctioned such a departure by a Lower Court (District Court), as to call for an exercise of this Court's supervisory power?

4, Can the United States Court of Appeals - Eighth Circuit - and District Court enter a decision in conflict with the decision of the Arkansas Supreme Court on the same important matter? Both courts disregarded that the State of Arkansas has a "Discovery Rule" which applies to fraud claims. When the Discovery Rule" is applied in this case, all of the Plaintiff's fraud claims were filed in a timely matter within the statute of limitations.

5. Will the United States Supreme Court agree that the Lower Courts failed to acknowledge, refer to or rule on the Plaintiff's claim under the Arkansas Civil Rights Act of 1993 based on his December 3, 1993 Letter to the Defendants in which he requested his job back, or alternate employment and his position on reasonable accommodations and that the U.S. Court of Appeals - Eighth Circuit - has so far departed from

the accepted and usual course of judicial proceedings, or sanctioned such a departure by a Lower Court (District Court), as to call for an exercise of this Court's supervisory power?

6. Will the United States Supreme Court agree that it cannot allow the Lower Courts to disregard and fail to rule on the Plaintiff's motion to amend the complaint to include the U.T.U. and S.P. Railroad as defendants and that the U.S. Court of Appeals - Eighth Circuit - has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a Lower Court (District Court), as to call for an exercise of this Court's supervisor power?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 18, 1997.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 24, 1997, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A - _____.

The jurisdiction of this Court is invoked under 28 U.S.C. - 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This information is unavailable to Plaintiff being Pro Se.

STATEMENT OF THE CASE

Following a trial that was held in 1991 regarding an injury Plaintiff sustained while employed by the Defendant, St. Louis Southwestern Railroad Company, Plaintiff sought and received clinical treatment from Dr. Banks Blackwell, a company physician of the Railroad. Dr. Blackwell testified live at the trail in 1991 for the Railroad and said that he could get the Plaintiff back to work. At the end of my treatment, Dr. Blackwell supplied me whit a medical release to return to work at my prior position as brakeman and promoted conductor. On or about March 2, 1992, Mike Lambert, Local Chairman of the United Transportation Union, and I presented the Railroad, Mr. Marvin Taylor, Trainmaster, with a medical release from Dr. Blackwell and requested permission to return to work. Mr. Taylor said that he would have to have a medical update form filled out. On March 18, 1992, Mr. Taylor was presented with this medical release update form filled out by Dr. Blackwell and I requested permission to return to work. Mr. Taylor said that he would have to send this Medical Release to the Railroad's home office in San Francisco, California and that as soon as he heard from them that he would contact me. Mr. Taylor never did contact me orally or in writing concerning this Medical Release as he said that he would do.

Several months later, I contacted my general chairman of my union in Tyler, Texas, Mr. Don Hollis. He told me that he had seen on the computer that the Railroad denied my request to return to work. **This was after the American Disability Act went into effect.** Under the rules of Agreement, Article 74 - Item number 6, between the Railroad the United Transportation Union if there is a dispute about whether an employee is able to return to work, a three (3) doctor panel will be convened to examine the employee. The union asked for the rules of this agreement to be enforced and the Railroad refused. The union then brought my request before the Public Law Board under the Railway Labor Act.

On or about July 20, 1993, a referee decision was entered by the Public Law Board upholding the Railroad's refusal to allow me to return to work. During the proceedings before the Public Law Board, the Railroad submitted evidence of a prior injury I sustained while on the job in 1981. Damages for that injury had been settled by the Railroad in an agreement which provided, in part, that the Railroad would never mention the injury in any later proceedings. In

contravention of the settlement agreement, the Railroad presented the fact that I had suffered the injury in 1981 as evidence of it's contention that I was disabled and might pose a risk to them if I returned to work. The Railroad did not inform the Public Law Board that after I was injured in 1981, that I continued to work everyday for over three (3) months until I was laid off due to reduction in work force.

On December 3, 1993, I sent a letter to Mr. Martin informing him that facts regarding my prior injury in 1981 were submitted to the Public Law Board by the Railroad in violation of the settlement agreement. Also, in this letter I requested either reinstatement to my prior position or, in the alternative, **a reasonable accommodation** in the form of an offer of another position with the Railroad. The Railroad signed a Return Receipt - Certified - but, did not respond to this letter.

On January 13, 1994, I filed a charge of discrimination and accompanying affidavit with the EEOC against the Railroad alleging that it had discriminated against me on the basis of my disability in violation of the Americans With Disabilities Act (ADA). Specifically, I alleged that the Railroad had discriminated against me by refusing to allow me to return to return to work and by failing to reinstate me following my letter to Mr. Martin on **December 3, 1993**. On December 22, 1994, The EEOC issued me a Right to Sue letter.

On March 24, 1995, I filed the Complaint in the present case. In my Complaint, I allege that the Railroad discriminated against me on the basis of my disability in violation of the ADA. On July 12, 1995, I filed an Amendment to the Complaint, asserting additional facts surrounding the Railroad's conduct throughout the proceedings before the Public Law Board and adding claims of race color and sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-5 et seq., fraud and violation of the Arkansas Civil Rights Act.

District Court should have acknowledged that the Plaintiff was Pro Se and accepted the Procedural History and the Affidavit as the material facts in dispute. **Both documents were attached to the Plaintiff's response To Motion For Summary Judgement**. Also, District Court had on record the Plaintiff's Pre-Trial Conference Information Sheet - Item No. 9 - listed seven (7) issues of fact expected to be contested. This document complied with Rule C-10(b) - Appendix E - and is a separate, short and concise statement

of the material facts as to which it contends a genuine issue exists to be tried. This rule does not require this document to be filed with the Plaintiff's Response to the Defendant's Motion for Summary Judgement. It was already on file with the District Court. All three (3) of these documents state that the Plaintiff **was not advised** by the Railroad that his employment was terminated on March 2, 1992.

Plaintiff will prove at trial that the Railroad did not inform him that his employment was terminated on March 2, 1992. Rather he was informed by the United Transportation Union after the ADA went into effect, Plaintiff will do so through witnesses who were present at the time.

Defendant's conduct between March 2, 1992 and December 3, 1993 constituted a continuing violation of the Federal Civil Rights Laws. The Railroad cites Delaware State College v. Ricks, 101 S.Ct 498 (1980) in support of its argument. However, the Supreme Court in Ricks explicitly left open the possibility that the continuing violation theory could be applied in such a situation, under the appropriate facts. The Court acknowledged that;

> **Complaints that employment termination resulted from discrimination can present widely varying circumstances. The application of the general principles discussed herein, necessarily must be made on a case-by-case basis.** Ricks, 101 S.Ct. at 504 fn. 9.

Unlike the Plaintiff in Ricks, the Complaint in this matter alleges sufficient facts regarding the Railroad's actions, before the Public Law Board and its failure to reinstate me after December 3, 1993 to establish a "continuing violation" from the Railroad's "alleged termination" of my employment on March 2, 1992. For example, in my charge before the EEOC, I indicted that the Railroad's discriminatory acts took place between March 2, 1992 and December 3, 1993. Further, in the Affidavit I submitted along with the EEOC charge, I recite specific facts regarding the Railroad's actions subsequent to March 2, 1992, including the proceedings before the Public Law Board and the Railroad's failure to reinstate me after my December 3, 1993 letter. Therefore, I have properly alleged sufficient facts under the standard set forth in Ricks to support the application of the continuing violation theory, and my claims regarding the

Railroad's discriminatory actions, including the alleged March 2, 1992 termination, should be held to be timely.

The Defendant's Failure to Reinstate following the December 3, 1993 letter was a **Separate And Distinct Act Of discrimination Which Occurred Within The Limitations Period.**

Given that separate incidents of discrimination took place, the limitations period should be calculated independently for each act. For example, in Samuels v. Raytheon Company, 934 F.2d 388 (1st Cir. 1991), a former employee filed an action against her employer under Title VII. In her complaint, Samuels claimed that the termination on July 7, 1978 **and** the company's subsequent refusal to reinstate her following the Industrial Accidents Board (IAB) decision and her grievance proceedings violated Title VII.

Raytheon moved to dismiss the complaint on the basis that Samuels had failed to file a timely charge with the EEOC. The trial court granted the motion to dismiss with respect to the **termination** claim but refused to dismiss the reinstatement claim, concluding that the failure to reinstate could constitute a separate, actionable discriminatory act.

On appeal, the Samuels court considered the trail court's ruling on the timeliness of the reinstatement claim. First, the court recognized that "[U]nder certain circumstances, an employer's refusal to reinstate an employee who has been terminated may constitute a separate incident of discrimination under Title VII." Samuels 934 F.2d At 391, citing Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990) and Poolaw v. City of Anadarko, 660 F.2d 459 (10th Cir. 1981). In applying this standard to the facts presented, the Samuels, court then held:

> **Here, the finding of the IAB provide new information concerning the correctness of the original termination and served as a basis for Samuels' request for reinstatement. Raytheon conducted a hearing to re-evaluate its original decision. Were Samuels to establish the existence of unlawful bias in Raytheon's hearing process or in [the senior labor relations specialist's] decision, Raytheon's refusal to reinstate her might provide a separate, actionable event under Title VII.** Id. at 391.

Like the employee in Samuels, the Railroad discriminated against me, not only with respect to my alleged termination on March 2, 1992, but also in its presentation before the Public Law Board in which it referred to my previous injury in 1981, and most recently, in its failure to reinstate me following my December 3, 1993 letter to Mr. Martin in which I requested reinstatement or accommodation. Thus, the Railroad's refusal to reinstate me was a separate discriminatory act from the alleged March 2, 1992 termination. As such, the statute of limitations for this claim should run form the date of the Railroad's failure to reinstate (ie., December 3, 1993). These facts were in my charge before the EEOC.

District Court states on Page 5 of the order entered on docket sheet April 5, 1996:

> **"After thorough review, the Court finds that whatever cause of action, if any, Plaintiff had under Title VII began to run on the date he was advised of the termination."**

As we have state, the Railroad did not notify the Plaintiff that he was terminated on March 2, 1992. Plaintiff contacted the Union after the ADA was in effect and the union representative told the Plaintiff that he had seen on a computer that the Railroad was going to refuse to put the Plaintiff back to work. In Staggs v. Northwest Airlines - Citation 592 F. Supp. 165, *169 - employee was not notified of decision and the Court denied motion for summary judgement.

Plaintiff's letter to the Defendant dated December 3, 1993 was within 180 days of filing the charge with the EEOC - "January 13, 1994" - and met the requirements of the ADA.

District Court has made an error in disregarding that the State of Arkansas has a "discovery rule" which applies to fraud claims. Said rule has most recently been set out int he case of Norris v. Bakker, 320 Ark. 629,899 S.W. 2d 70 (1995). There the Arkansas Supreme Court succinctly stated that the statute of limitations on fraud was tolled during the time in which the act of fraud had been concealed. They stated that the statute does not begin to run until a party knows or reasonably should know about the fraud. Once the rule is applied to the case at bar, it becomes clear that the Plaintiff's fraud claims are not barred by the statue of limitations.

As to the claim for fraud during the trail of October, 1991 and the

statements by the Defendant's doctor. The doctor stated that he could get the Plaintiff back to work. When the discovery rule is applied, it becomes clear that the statue did not begin to run when the statement was made. Rather the statute began to run in late 1992 after the ADA went into effect. The complaint is this case was filed on March 21, 1995 which is obviously less than 3 years since the date and hence the complaint is not barred by the 3 year statute of limitations.

As to the claims of fraud which are based on the Plaintiff's earlier 1981 injury, the defendant had made a promise to never refer to this injury in the future. The Plaintiff did not discover the fraudulent nature of the 1981 promise until late August, 1993, when the Plaintiff received the written decision from the Public Law Board when that injury was used as an additional reason not to give the Plaintiff his job back. Obviously, August 1993 is less than 3 years since the filing of the complaint in this case.

Plaintiff admits the effective date of the Arkansas Civil Rights Act of 1993. However, Plaintiff's claim under this act is based on his December 3, 1993 letter to the Defendants in which he requested his job back, or alternate employment and his position or reasonable accommodations. Clearly, this letter was written after the Civil Rights Act went into effect. It is clear that after the arbitration decision in July 1993, the Plaintiff is perceived as being disabled by the Defendant. Plaintiff has alleged that he is being and has been, denied employment by the Defendant based on his disability.

REASONS FOR GRANTING THE PETITION

1. The U.S. Court of Appeals and District Court has entered a decision in conflict with the decision of the United States Supreme Court on the same important mater. The Supreme Court in Delaware State College v. Ricks, 101 S. Ct. 498 (1980) explicitly left open the possibility that the continuing violation theory can be applied in this case under the appropriate facts. Ricks 101 S. Ct. at 504 fn. 9. If the United States Supreme Court allows the Lower Courts to disregard its former ruling it will not only violate the federal and civil rights of this Plaintiff, but it will be setting a national precedence to violate the rights of all citizens nation wide.

2. The U.S. Court of Appeals and District Court has entered a decision in conflict with the decision of another Untied States Court of Appeals on the same important matter. The Defendant's failure to respond to the Plaintiff's certified letter dated December 3, 1993,requesting reinstatement or accommodation, was a Separate and District Act of Discrimination which occurred within the limitations period of the American Disability Act. The Appeals Court in Samuels 934 F. 2d At 391, citing Jensen v. Frank, 912 F. 2d 517 (1st Cir. 1990) and Poolaw v. City of Anadarko, 660 F. 2d 459 (10th Cir. 1981) held:

> **"An employer's refusal to reinstate an employee who has been terminated may constitute a separate incident of discrimination under Title VII."**

If the United States Supreme Court allows such an erroneous decision by the U.S. Appeals Court - Eighth Circuit - which is in conflict with another Appeals Court, it will deny the rights of all citizens to have the same decision by the same court on the same matter. This would be discrimination against all citizens nation wide.

3. The United States Court of Appeals - Eighth Circuit - has so far departed from the accepted and usual coarse of judicial

proceeding and sanctioned such a departure by a Lower Court (District Court), as to call for an exercise of this Court's supervisory power. District Court states that Plaintiff did not comply with Rule C-10 which requires Plaintiff to file a separate,short and concise statement of the material facts as to which it contends a genuine issue exists to be tried. Both Courts should have acknowledged the Plaintiff's Pre-Trail Conference Information Sheet, Item No. 9 - listed seven (7) issues of fact expected to be contested and it was on file with the District Court thereby complying with Rule C-10. Also, the Plaintiff, Pro SE, included a Procedural History and Affidavit listing the material facts in dispute along with his response to the motion for summary judgement. Will the United States Supreme Court exercise its supervisory power by reversing the lower court's decision,thereby not only upholding the Plaintiff's federal and civil rights but the rights of every citizen to have their day in court to obtain justice?

4. The United States Court of Appeals - Eighth Circuit - and District Court has entered a decision in conflict with the decision of the Arkansas Supreme Court on the same important matter. Both courts disregarded that the State of Arkansas has a "Discovery Rule" which applies to fraud claims. Said rule has most recently been set out in the case of Norris v. Bakker, 320 Ark. 629,899 S.W. 2d 70 (1995). When the Discovery Rule is applied in this case, all of the Plaintiff's fraud claims were filed in a timely matter within the statute of limitation. If the United States Supreme Court allows the lower courts to disregard the State of Arkansas' Discovery Rule,this will be setting a national precedence for the lower courts to disregard all the rules and laws of every state in this nation and in doing so will violate the federal and civil rights of every Plaintiff who has filed a complaint in a timely matter.

5. The United States Court of Appeals - Eighth Circuit - has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court (District Court), as to call for an exercise of this court's supervisory power. Plaintiff's claim under the Arkansas Civil

Rights Act of 1993 is based on his December 3, 1993 Letter to the Defendant in which he requested his job back, or alternate employment and his position on reasonable accommodations. Both courts failed to acknowledge, refer to or rule on the Plaintiff's claim under the Arkansas Civil Rights Act of 1993. Will the United States Supreme Court exercise it's supervisory power by acknowledging that no court has the authority to violate the civil rights of any plaintiff - nation wide - by failing to rule on the Plaintiff's claim as if it did not exist and send this case back to the District Court for trail by jury? Failure to do so will deny all the citizens in this nation the right to file a complaint and have it ruled on by the Court.

6. The United States Court of Appeals - Eighth Circuit - has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court (District Court), as to call for an exercise of this Court's supervisory power. Plaintiff's motion to amend complaint to include U.T.U. and S.P. Railroad as defendants was filed prior to the defendant's motion for summary judgement and was never ruled on by the lower court. Will the United States Supreme Court agree that it cannot allow a lower court to operate in this matter for it not only violates the Plaintiff's rights, but it will be setting a national precedence that will deny all citizens nation wide the right to file a complaint against any party or parties upon which relief may be granted?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul M. McDonald

Date December 19, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2651

Paul M. McDonald,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Arkansas
St. Louis Southwestern Railroad,	*	
	*	[UNPUBLISHED]
Appellee.	*	

Submitted: August 5, 1997
Filed: August 18, 1997

Before WOLLMAN, LOKEN, and HANSEN, Circuit Judges.

PER CURIAM.

Paul M. McDonald appeals the district court's orders granting summary judgement to St. Louis Southwestern Railroad and denying his Federal Rule of Civil Procedure 60 (b) motion in this employment discrimination action. After de novo review we conclude the district court's grant of summary judgement was correct. See 8th Cir. R. 47B.

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1 The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Filed
U.S. District Court
Eastern District of Arkansas
APR 04 1996
By: James W. McCormack, Clerk
Dep. Clerk

PAUL M. McDONALD PLAINTIFF

V. NO. LR-C-95-182

ST. LOUIS SOUTHWESTERN RAILROAD DEFENDANT

ORDER

Plaintiff, Paul M. McDonald, was employed by defendant, St. Louis Southwestern Railroad, as a brakeman for several years until he was injured in a work-related accident in 1988. Several years following that accident plaintiff filed a Federal Employer's Liability Act lawsuit against defendant, in which he claimed to have suffered, among other things, serious and permanent injuries to his back and neck. On October 24, 1991, plaintiff received a jury verdict of $150,000.00 as compensation for those injuries.

In March 1992, plaintiff presented certain employees of defendant with a release from his physician stating that plaintiff was able to return to work. In conjunction therewith, plaintiff asked to be reinstated to his former job or placed in another position commensurate with his ability to work. Defendant refused to reinstate plaintiff and advised him that his employment was terminated. Plaintiff grieved that decision through his union and also sought review by Public Law Board pursuant to the provisions of the Railway Labor Act. Both were resolved unfavorably to plaintiff.

On January 13, 1994, Plaintiff filed his charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC found that plaintiff's charge was not filed in a timely manner and, accordingly, that it lacked jurisdiction over the matter. After receiving Notice of Right to Sue, plaintiff initiated this litigation against defendant on March 21, 1995, advancing claims pursuant to Title VII of the Civil Rights Act of 1964, the Americans

with Disabilities Act, and the Arkansas Civil Rights Act, as well as claims for common law fraud.

Now before the Court is defendant's Motion for Summary Judgement. Both sides have fully briefed the issues presented and the motion is ripe for determination. Consistent with the requirements of Rule C-10 of the Rules of the United States District Court for the Eastern and Western Districts of Arkansas, defendant annexed to its summary judgement motion a separate, short and concise statement of the material facts in this cause to which defendant contends there is no genuine dispute. Rule C-10 further requires the non-moving party to file its own separate and concise statement of the material facts as to which it maintains a genuine dispute does exist for trial. Finally, Rule C-10 provides that all material facts set out in the statement of the moving party which are not controverted by the non-moving party in the manner prescribed by this rule are deemed admitted.

Inasmuch as plaintiff did not file a statement of material facts along with his response to the motion, the Court finds that the material facts set out by defendant should be, and they are hereby, deemed admitted for the purposes of this suit. Those admitted facts are, as follows:

1. Paul McDonald is a former employee of St. Louis Southwestern railway Company.

2, Mr. McDonald filed a personal injury lawsuit against the Railroad concerning an injury he alleges to have incurred in 1988 while working as a brakeman for St. Louis Southwestern Railway.

3. A jury verdict was rendered in behalf of Mr. McDonald in his FELA lawsuit on October 24, 1991, in the amount of $150,000.00.

4. On March 2, 1992, Paul McDonald was advised by the Railroad that his employment was terminated.

5. McDonald, through his union, grieved this decision and pursuant to the provisions of the Railway Labor Act ultimately submitted it to Public Law Board No. 4948. The Board rendered a decision in favor of the Railroad and denying Mr. McDonald's grievance concerning his termination from employment.

6. On January 13, 1994, Mr. McDonald alleges that he filed a Charge of Discrimination with the EEOC.

7. On December 22, 1994,the EEOC issued a Right to Sue letter, finding that McDonald's Charge of Discrimination was untimely filed and that the agency did not have jurisdiction of his claim.

8. Mr. McDonald subsequently filed this lawsuit on March 21,1995.

In ruling upon a motion for summary judgment, the Court must determine whether the record, consisting of the pleadings, depositions, answers to interrogatories, and admissions on file,together with any affidavits,when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Rule 56(e) of the Federal Rules of Civil Procedure provides,in part, that "[w]hen a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The "[reviewing] judge must ask himself not whether he thinks the evidence unmistakably favored one side or the other but whether a fair-minded jury would return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry,therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242,251 (1986). In this regard, the "[s]ummary judgement procedure is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole...." celotex Corp. v. Catrett, 477 U.S. 317,327 (1986).

The Court has deemed it admitted that on March 2, 1992, plaintiff was advised by defendant that his employment was terminated. That appears to be the date the EEOC used in finding that plaintiff's charge,which reflects a filing date of January 13, 1994, was not filed in a timely fashion. In order to avail oneself of the remedies provided by Title VII of the 1964 Civil Rights Act, a claimant must file a charge of discrimination with the EEOC within 180 days of the date of the alleged discriminatory act or the claim is barred. See,e.g., Chaffin v. Rheem Mfg. Co., 904 F.2d 1269, 1271 (8th Cir. 1990).

Defendant assets that the date of notice of termination, March 2, 1992, is the date which must be used in calculating the timeliness of the filing of plaintiff's EEOC charge. On the other hand, plaintiff maintains that the discrimination was continuing in nature and did not cease until December 3, 1993, the date of plaintiff';s last letter to defendant requesting reinstatement, to which plaintiff received no response.

After thorough review, the Court finds that whatever cause of action, if any, plaintiff had under Title VII began to run on the date he was advised of the termination, not on any of the subsequent dates that his letter attempts at reinstatement were rejected. See Delaware State College v. Ricks, 499 U.S. 250 (1980). As noted, plaintiff did not file his EEOC charge until January 13, 1994, more than 22 months, or nearly 700 days, after his termination. Plaintiff's efforts through the grievance process or with the Public Law Board did not serve to toll the running of the 180-day period, for "pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period." Id. at 261. Thus, the Court finds that plaintiff's Title VII claim is time-barred and must be dismissed.

Defendant argues that plaintiff's claims under the ADA and the Arkansas Civil Rights Act must also be dismissed because the relevant portions of these acts under which plaintiff seeks to recover were not in effect at the time of plaintiff's termination in March of 1992 and none of such provisions is to be given retroactive effect. In response to these arguments, plaintiff repeats the assertion that the date of termination should not be used in determining the merit or propriety of his claims. Inasmuch as the Court has already decided that March 2, 1992, was the effective date of the alleged discrimination practiced upon plaintiff, the Court agrees with defendant that plaintiff may not seek relief under either the ADA or the Arkansas Civil Rights Act for defendant's decision to terminate his employment. Plaintiff's claims under these acts must be dismissed.

Finally, plaintiff has also alleged a claim of common law fraud against defendant. That claim concerns an injury plaintiff sustained in 1981 and a subsequent agreement with defendant that the injury would not be mentioned thereafter. Plaintiff also alleges that he was somehow defrauded by the testimony of certain medical witnesses for defendant in the 1991 personal injury trial and the defendant's subsequent use of that and other testimony in refusing to return plaintiff to work.

The statute of limitations for a common law fraud claim in the State of Arkansas is three years. Plaintiff's personal injury trial concluded on October 24, 1991. He filed his complaint herein on March 21, 1995. To the extent that plaintiff's fraud claim is based upon any conduct or statement attributable to defendant which occurred before or during the 1991 trail, such a claim is barred by the statute of limitations. Any claims of fraud premised upon defendant's mention of the 1981 injury before the Public Law Board should have been taken up consistent with the provisions of the Railway Labor Act. Lastly, even viewing plaintiff's fraud allegations in the light most favorable to him, the Court is convinced that plaintiff has failed to allege a set of facts upon which relief may be granted for a claim of common law fraud. The fraud claims, too, must be dismissed.

In deciding the case as it has, the Court was not required to decide defendant's argument that one who claims serious and permanent disability and receives compensation therefor should not be permitted to assert later that he is capable of performing the essential functions of his job. The lack of discussion of this point should not be taken as an indication that the Court finds no merit in the argument, for such is not the case.

Upon all of the foregoing, the Court finds that defendant's Motion for Summary Judgement should be, and it is hereby, granted. All of plaintiff's claims shall be dismissed. Any other pending motions are hereby denied as moot.

DATED this 3rd day of April, 1996

Elsijane T. Roy
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULES 58 AND/OR 79(A) FRCP ON 4-5-96 BY _____

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2651EALR

Paul M. McDonald,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
Vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
St. Louis Southwestern Railroad,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 24, 1997

Order Entered at the Direction of the Court:
Michael E. Gians
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
APR 04 1996
JAMES W. McCORMACK, CLERK
BY:_____
DEP. CLERK

PAUL M. McDONALD PLAINTIFF

V. NO. LR-C-95-182

ST. LOUIS SOUTHWESTERN RAILROAD DEFENDANT

JUDGMENT

Pursuant to the Order entered in this matter on this date, it is Considered, Ordered and Adjudged that plaintiffs' complaint should be, and it is hereby, dismissed with prejudice. The relief sought therein is denied. Each side shall bear its own costs herein.

DATED this 3rd day of April, 1996.

Elsijane T. Roy
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP.
ON 4-5-96 BY Bme

APPENDIX D

RULE C-10

SUMMARY JUDGEMENT MOTION

In addition to the requirements set forth in Local Rule C-7, the following requirements shall apply in the case of motions for summary judgement.

(a) Any party moving for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, shall annex to the notice of motion a separate, short and concise statement of the material facts as to which it contends there is no genuine issued to be tried.

(b) If the non-moving party opposes the motion, it shall file, in addition to any response and brief, a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried.

(c) All material facts set forth in the statement filed by the moving party pursuant to paragraph (a) shall be deemed admitted unless controverted by the statement filed by the non-moving party under paragraph (b).

Adopted and effective March 14, 1984

APPENDIX E